No. 91-760

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOAN PETRONE,
Petitioner,

v.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

In a disability case that was remanded to the Social Security Administration because of a change in the law favorable to the claimant, did the court err in denying attorney's fees under the Equal Access to Justice Act on the ground that the claimant had not "prevailed" in the litigation, even if (1) the claimant ultimately received disability benefits; (2) such benefits could not have been obtained without the lawsuit; and (3) the government's position was not substantially justified?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 936 F.2d 428 (9th Cir. 1991), and is reproduced in the appendix at 1a-7a. The recommendation of the magistrate and the order of the United States District Court for the Central District of California concerning attorney's fees are reproduced in the appendix at 8a-19a, and 20a-21a, respectively, and are not reported. The district court's judgment on the merits is reproduced in the appendix at 24a-29a, and is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1991. The decision of the court of appeals denying rehearing and the suggestion for rehearing en banc was entered on August 12, 1991 (22a-23a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Equal Access to Justice Act, 28 U.S.C. § 2412(d), provides in pertinent part:

> (1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

STATEMENT OF THE CASE

The issue in this case is whether a plaintiff who has obtained disability benefits under the Social Security Act, as a direct result of her federal court lawsuit challenging the termination of those benefits, may be denied attorney's fees under the Equal Access to Justice Act ("EAJA") on the ground that she is not a "prevailing party" solely because there was an intervening change in the law that was *favorable* to her. That precise issue -- and, more generally, the important question of whether, and in what circumstances, a change in the law can prevent a victorious plaintiff from obtaining attorney's fees under federal fee-shifting legislation -- has divided the circuit courts and, therefore, warrants this Court's attention.

On February 16, 1966, petitioner Joan Petrone applied for Social Security disability insurance benefits under 42 U.S.C. § 423(d) and was found to be disabled as of July 31, 1963, on the basis of schizophrenia, depression, paranoia, and other psychotic disorders, including a history of nervous breakdowns (Administrative Record ("AR") 76). Petitioner also applied for, and received, Supplemental Security Income ("SSI") disability benefits in 1976, shortly after that program became law (2a).

In 1982, respondent Secretary of Health and Human Services (the "Secretary") reviewed petitioner's disability case and determined that her disability had ceased in October 1982 because of improvements in her medical condition (*id*). Petitioner appealed the Secretary's decision to an administrative law judge ("ALJ"), who upheld the Secretary's decision (AR 9-14). The Appeals Council affirmed the ALJ's decision, thus making the ALJ's decision the final decision of the Secretary (AR 3-4).

On March 27, 1984, petitioner filed a complaint in the United States District Court for the Central District of California, pursuant to 42 U.S.C. § 405(g), seeking judicial review of the decision to terminate her disability benefits. After the Secretary filed an answer and the administrative record, petitioner filed a motion for summary judgment and supporting brief. Without ruling on that motion, the district court, with the consent of the parties, remanded the case to the Secretary for further review pursuant to section 2(d)(2) of the Social Security Disability Reform Act of 1984 ("Reform Act"), 98 Stat. 1794, 1797 (1984)(42 U.S.C. § 423 note)(*see* 2a). That section required that all pending cases concerning cessation of disability benefits, in a category known as "medical improvement" cases, be remanded to the Secretary for reevaluation.

On November 2, 1988, nearly four years after the remand, the Secretary informed petitioner that she was entitled to disability benefits for the period from December 1982 until November 1984, but that after that date no benefits were payable because of petitioner's work and earnings, not because of any improvement in her medical condition (26a). Thereafter, the district court entered judgment in favor of petitioner (24a-25a) for 28 addi-

tional months of benefits, amounting to an award in excess of $10,000 (26a).

On November 28, 1988, petitioner filed an application for an award of EAJA attorney's fees in the district court. The Secretary opposed the application on the ground that petitioner was not a "prevailing party" because it was Congress that had altered the situation by enacting the Reform Act and that no claimant could be a prevailing party if his or her case had been remanded under that Act. The Secretary also contended that, even if petitioner was not automatically prevented by the Reform Act from being a prevailing party, the agency's position had been "substantially justified," and she was not entitled to EAJA fees for that reason. The matter was referred to a magistrate who recommended that petitioner's fee application be denied for the sole reason that the petitioner was not a "prevailing party" within the meaning of the EAJA (8a-18a). The magistrate noted a split in authority among district courts, but sided with the only two circuit courts of appeals that had then addressed the issue. Those courts had held that claimants whose benefits were restored after having their cases remanded under the Reform Act had not prevailed in the litigation (13a). The district court noted its agreement with the recommendation and denied fees in a one-line order (20a).

The court of appeals affirmed in a split decision, holding that "a plaintiff whose victory results from a change in the law is [not] a prevailing party within the meaning of the EAJA" (2a). The opinion began by looking to the standard set out in *Andrew v. Bowen*, 837 F.2d 875 (9th Cir. 1988), where the Ninth Circuit held that a plaintiff who settles a lawsuit favorably has prevailed under the EAJA if there is a "clear causal relationship" between the lawsuit and the settlement (3a).

Petitioner argued that this test had been satisfied because, had she not filed her lawsuit, she would not have obtained a court remand and reinstatement of her disability benefits (*id*). The court recognized that this was true (*id.*, *citing* Reform Act, 98 Stat. at 1797), but held that petitioner had not prevailed because her victory came from Congress, not in the courtroom (3a). The court of appeals also declined to accept the "catalyst" theory, *i.e.*, that

petitioner's lawsuit, along with many others pending around the nation, motivated Congress to enact the Reform Act (*id.*), on the ground that such a theory was too speculative and that "no clear causal relationship can be shown to this particular suit" (*id*). The majority recognized that its ruling, whose effect is automatically to deny fees to any claimant whose case was remanded, no matter how meritorious the claim may have been, was at odds with recent decisions in three circuits, but sided with what it termed "the earlier and better view" of three other circuits (3a-4a).

Judge O'Scannlain dissented. He began by reviewing the background to the Reform Act, noting that, as a general rule, disability benefits may be terminated if there is substantial evidence that the disability no longer exists (4a). *See* 42 U.S.C. § 423(f). The Secretary's interpretation of the law prior to 1980, the dissent explained, was that disability benefits could only be terminated if the Secretary showed that the beneficiary's condition had improved since the prior finding of disability (4a). In 1980, however, the Secretary administratively abandoned this "medical improvement" standard, opting instead for a "current disability" standard, thereby shifting the burden onto the recipient to show that he or she continued to be disabled (*id*).

This new policy was challenged in many lawsuits nationwide, prompting Congress to enact the provisions of the Reform Act at issue here (*id*). The Reform Act took a middle ground, placing the burden neither on the recipient to prove continued disability nor on the Secretary to show medical improvement, but providing that terminations must be based on substantial evidence of medical improvement (*id*). *See* 98 Stat. 1794-95. In addition, in recognition of the fact that the Secretary had imposed what many courts, and now Congress, had determined to be an impermissible burden on recipients, the Reform Act required that all "medical improvement" cases pending on September 19, 1984, both class actions and individual cases such as petitioner's, be remanded to the Secretary for further consideration (4a-5a). *See* 98 Stat. at 1797.

Judge O'Scannlain explained that, in addition to the majority here, three circuits had held that an individual who won reinstate-

ment after a remand under the Reform Act may never be said to have "prevailed" in the litigation for EAJA purposes (5a). A second view, endorsed by two circuit courts and by Judge Breyer, dissenting in *Guglietti v. Sec'y of HHS*, 900 F.2d 397 (1st Cir. 1990), is that, by bringing the lawsuit "that enabled retroactive application of the Reform Act," the plaintiff has prevailed under the EAJA (6a). Finally, Judge O'Scannlain described and embraced the "inevitable victory" approach, adopted by three circuit courts and by Judge Easterbrook, concurring in *Hendricks v. Bowen*, 847 F.2d 1255 (7th Cir. 1988), under which the plaintiff has "prevailed" if benefits would have been restored even if the Reform Act had not been enacted (6a). The dissent noted that this approach avoids both rewarding lawyers because of a chance event -- the Reform Act -- and "the equally unfortunate result of failing to compensate claimants who have brought meritorious lawsuits" (*id*).

Judge O'Scannlain thus would have remanded the case to the district court for a determination of whether petitioner would have prevailed in the absence of the Reform Act and, if so, whether the position of the government had been substantially justified (*id*). If both questions were resolved in petitioner's favor, he noted, she should be awarded fees (7a).

REASONS FOR GRANTING THE WRIT

A. THERE IS A DEEP SPLIT IN THE CIRCUIT COURTS ON AN IMPORTANT AND RECURRING ISSUE.

As the dissent recognized, there is a deep split in the courts of appeals concerning whether a successful plaintiff in a disability action must automatically be denied EAJA fees if that plaintiff's case was sent back to the Secretary pursuant to the mandatory remand provisions of Section 2 of the Reform Act. In itself, this ever-widening split on this important issue calls for resolution by this Court. Moreover, the question presented here is more fundamental: whether a party, who has obtained exactly what she sought in her lawsuit, may be denied fees solely on the ground that there has been a change in the law favorable to her, although she

would have been successful even if the law had never changed and even though she would have won nothing at all if she had not filed her lawsuit.

1. In addition to the majority here, two courts of appeals have held that, under no circumstances, may a plaintiff "prevail" for EAJA purposes if that plaintiff's disability case was remanded under Section 2 of the Reform Act. *See Guglietti v. Sec'y of HHS*, 900 F.2d 397, 400-03 (1st Cir. 1990); *Hendricks v. Bowen*, 847 F.2d 1255, 1258 (7th Cir. 1988). These cases hold that it is necessary to prove a causal relationship between the plaintiff's suit and the reinstatement of disability benefits, and that, because the Reform Act intervened, such a causal relationship can never be established.

Other judges have rejected this *per se* denial approach, relying on two different theories. The Sixth Circuit has held that the filing of a successful lawsuit for disability reinstatement, because it is a necessary predicate for winning such reinstatement, itself bestows prevailing party status. *Perket v. Sec'y of HHS*, 905 F.2d 129, 134-35 (6th Cir. 1990); *accord Guglietti*, 900 F.2d at 405-08 (Breyer, J., dissenting); *Truax v. Bowen*, 842 F.2d 995, 997-99 (8th Cir. 1988)(Heaney, J., dissenting); *see also Hyatt v. Heckler*, 807 F.2d 376, 382 (4th Cir. 1986)(in class action challenging "medical improvement" standard, Secretary's argument that Reform Act barred EAJA fees rejected because filing of case was "but-for" cause of relief for named plaintiffs and class). The judges espousing this view have also noted that the filing of the lawsuit and the enactment of the Reform Act were not unrelated events, but that the Reform Act was a reaction to the filing of many lawsuits nationwide, which would include the particular case in which fees were being sought. *E.g., Guglietti*, 900 F.2d at 405; *see* H. Rep. No. 98-618, 98th Cong., 2d Sess. 9-13 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3038, 3046-3050.

Alternatively, four circuits have held that a claimant who has achieved reinstatement, and would have done so absent the Reform Act, has prevailed within the meaning of the EAJA. *Perket*, 905 F.2d at 133-34; *Robinson v. Bowen*, 867 F.2d 600 (10th Cir. 1989)(per curiam), *aff'g*, 679 F. Supp. 1011, 1014-15 (D. Kan.

1988); *Gowen v. Bowen*, 855 F.2d 613, 617 n.3 (8th Cir. 1988); *Rhoten v. Bowen*, 854 F.2d 667, 670 (4th Cir. 1988); *accord Lopez v. Sullivan*, 882 F.2d 1533, 1537 (10th Cir. 1989); *Hendricks*, 847 F.2d at 1259 (Easterbrook, J., concurring).*

2. While the merits of most Reform Act cases have by now wended their way through the administrative process and the federal courts, and even the fees portion of many of those cases is complete, this Court should resolve the deep split among the circuits to clarify the law for the Secretary and those fee applicants who have yet to have their applications finally adjudicated. The fact that some circuits have just recently decided this issue, *see, e.g. Perket, supra*, and that five circuits have yet to weigh in, suggests that there are Reform Act cases for which fee applications are still pending or have yet to be filed. *See, e.g.*, Brief for Appellee [Secretary], at 8-10, *Marquez v. Sullivan*, No. 91-3703 (filed 6th Cir. Oct. 18, 1991)(Secretary urging court of appeals to deny fees, despite *Perket*, because of intervention of Reform Act). Moreover, the problem here is not only that many Reform Act plaintiffs who have won their benefits have lost any chance for a fee, although that is an important problem worthy of this Court's attention. More generally, the split that divides the courts of appeals is, as the Ninth Circuit correctly framed it, whether a plaintiff whose victory coincides with a favorable change in the law can ever be considered a "prevailing party" under this or any other fee-shifting statute (2a).

That issue arises not infrequently and will continue to do so in many contexts. A recent change in disability law, although one

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* As indicated in the text, the Sixth Circuit in *Perket* has endorsed both theories for potential EAJA recovery, 905 F.2d at 133-35, as has the Fourth Circuit in *Hyatt* and *Rhoten*. In *Truax v. Bowen*, 842 F.2d 995 (8th Cir. 1988), the Eighth Circuit appeared to embrace the same approach taken by the court of appeals here. *See also Goodro v. Bowen*, 854 F.2d 313 (8th Cir. 1988). However, in *Gowen v. Bowen*, 855 F.2d 613 (8th Cir. 1988), that court clearly endorsed the "inevitable victory" theory, and distinguished *Truax* on the ground that the claimant in *Gowen* would have won "irrespective of the Reform Act of 1984." 855 F.2d at 617 n.3; *accord Kelly v. Bowen*, 862 F.2d 1333, 1337 n.4 (8th Cir. 1988). Thus, the decision below seems to be in error in suggesting that the Eighth Circuit denies fees to Reform Act plaintiffs in all circumstances (4a).

prompted by a lawsuit, not Congressional action, illustrates our point. In *Sullivan v. Zebley*, 110 S. Ct. 885 (1990), this Court declared invalid the Secretary's regulations that had required applicants for children's SSI disability benefits to show that their conditions met a specific impairment, based on medical evidence alone, rather than allowing them to present evidence similar to the vocational evidence that can be used to support an adult's disability claim. *Id.* at 892-95. The Secretary has now agreed to a remand in every children's disability case for reassessment under new regulations promulgated in the wake of *Zebley*. Stipulation and Order, ¶ I C., page 3, *Zebley v. Sullivan*, No. 83-3314 (E.D. Pa. March 14, 1991); *see* 20 C.F.R. §§ 416.924-924f (1991).

Under the Ninth Circuit's approach here, EAJA fees will be denied in all of the individual actions pending nationwide -- because there is no "clear causal relationship" between the individual action and the victory in *Zebley* -- even if the children in those individual cases win their benefits on remand, even if they would have done so in the absence of the new regulations, and even if the Secretary's position was totally unreasonable in those cases. Under an "inevitable victory" theory, however, the court must look to whether a child's claim would have been successful regardless of the remand, for instance, where victory was preordained by precedent rejecting the Secretary's pre-*Zebley* interpretation, *see Zebley by Zebley v. Bowen*, 855 F.2d 67, 75 n.4 (3d Cir. 1988)(listing cases), or because the claim met the standards of the pre-*Zebley* children's disability regulations.

We use the *Zebley* example primarily because of its magnitude: numerous individual pending actions will be remanded under the stipulation for reconsideration in light of the new regulations. Unless resolved by this Court, the EAJA question in those cases will confound the courts in precisely the same way that the Reform Act has in deciding whether to award attorney's fees here. This example is only illustrative of the broader issue that divides the circuit courts -- an issue which will inevitably recur whenever an intervening change in the law arguably forms the basis for a court's decision in a plaintiff's favor. *Compare* 5a (no fees where there has been intervening change in law), *with Brouwers v. Bowen*, 823 F.2d 273, 275 (8th Cir. 1987)(where some

intervening events contributed to plaintiffs' victory, prevailing party status may be denied only where intervening event was sole cause of victory). *Cf. Mosely v. Hairston*, 765 F. Supp. 915 (S.D. Ohio 1991)(no fees where court of appeals held case moot because of favorable change in law, even though district court had entered judgment for plaintiffs). This Court should grant review to resolve this important question.

B. THE DECISION BELOW IS AT ODDS WITH THE PURPOSES OF THE EAJA AND OTHER FEE-SHIFTING STATUTES AND WITH PRIOR DECISIONS OF THIS COURT.

Both of the theories that permit EAJA fees following Reform Act remands are preferable to the strict non-recovery rule endorsed by the court of appeals. The Ninth Circuit's approach, which requires a fee applicant to prove that his or her suit, *in itself*, was the catalyst for Congressional action, will almost invariably result in a denial of fees because, as the majority noted (3a), the pendency of one suit among many will almost never cause Congress to change the law. Such a rule runs counter to Congressional intent in enacting fee-shifting statutes such as EAJA and is at odds with the teachings, if not the actual holdings, of this Court's prior decisions.

1. As we have indicated, *Perket v. Sec'y of HHS*, 905 F.2d at 134-35, holds that a claimant whose case was remanded under the Reform Act has prevailed by filing the lawsuit that ultimately resulted in the reinstatement of benefits. *See also Hyatt*, 807 F.2d at 382. As Judge Breyer remarked in dissent in *Guglietti*, "as a matter of ordinary English usage" such a claimant has "'prevailed,'" because "she did get the relief that she wanted... [and] her legal action was a necessary condition for obtaining it." 900 F.2d at 405; *see Hewitt v. Helms*, 482 U.S. 755, 761 (1987).

We believe that this view best comports with EAJA's purposes since it accords prevailing party status to a plaintiff who has opposed faulty government action and achieved the desired result. A contrary rule places all the costs on the winning party, *even where the government's position has been unreasonable*, thus

diminishing the value of the plaintiff's "victory" and defeating EAJA's purposes of "'curbing excessive regulation and the unreasonable exercise of Government authority.'" *See Comm'r, INS v. Jean*, 110 S. Ct. 2316, 2322 (1990)(*quoting* H. Rep. No. 96-1418, p. 12 (1980)). Moreover, Judge Breyer's reasoning is consistent with this Court's "'generous formulation'" of the "prevailing party" rule as a general matter. *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792 (1989)(*quoting Nadeau v. Helgemoe*, 581 F.2d 275, 279 n.3 (1st Cir. 1978)). *See* discussion *infra* at 13.

At first blush, this approach appears to be very generous to a fee applicant such as petitioner, because she would have "prevailed" for fees purposes even if she were merely "a fortuitous beneficiary" of Congressional action, *i.e.* she won only because of such action. *Hendricks*, 847 F.2d at 1259 (Easterbrook, J., concurring). But since fees will not be awarded if the government can show that its position was substantially justified, 28 U.S.C. § 2412(d)(1)(A), fortuitous beneficiaries will be weeded out because a lack of substantial justification presupposes that the government would have lost its case. *See Pierce v. Underwood*, 487 U.S. 552, 564-66 (1988); *Hendricks*, 847 F.2d at 1261. Thus, in practice, there will be little if any difference in outcome between the *Perket* approach and that which requires a plaintiff to show that victory was inevitable without the change in law.

However, Judge Easterbrook's "inevitable victory" analysis aptly illustrates the arbitrariness of the result reached below. For instance, a medical improvement case decided favorably to a claimant on the day prior to the effective date of the Reform Act could well result in an award of fees, while, under the Ninth Circuit's decision, an otherwise identical case decided the next day would not result in a fee award under any circumstances. 847 F.2d at 1260. Indeed, this is precisely what happened to many claimants. *Id.* (citing cases). More arbitrary still is the example of two disability cases filed on the same day in, say, 1983, that could have different results on the fees question, solely because one case had been decided by a "prompt" judge prior to the Reform Act's effective date, while the other had drawn a judge whose docket was clogged, thus allowing the Reform Act to intervene. *See id.* In

the former situation a victorious claimant's attorney might well obtain a fee from the government, but in the latter situation the claimant would expend a good portion of her hard-won benefits on attorney's fees even though "[i]t was to prevent this sort of diminution by unreasonable governmental action that the EAJA was enacted." *Id.*

For many claimants, such as petitioner, fees are withheld from the claimant's past-due benefits for payment to his or her attorney by the Secretary pursuant to 42 U.S.C. § 406, although that fee must be returned to the claimant to the extent that an EAJA fee is awarded. Pub. L. No. 99-80, § 3, 99 Stat. 186 (28 U.S.C. § 2412 note). *See Wells v. Bowen*, 855 F.2d 37, 42 (2d Cir. 1988). Therefore, the Ninth Circuit would give a "medical improvement" plaintiff, whose victory arrived prior to the Reform Act, a greater net benefit than an otherwise identically-situated plaintiff who won after a Reform Act remand. This is more than a little ironic since "[i]t was because Congress suspected that many of the terminations of disability benefits had been unreasonable that the Reform Act was enacted." *Hendricks*, 847 F.2d at 1260 (Easterbrook, J., concurring). Thus, the purposes of both the Reform Act and the EAJA have been harmed by the Ninth Circuit's decision.

2. The facts of petitioner's case epitomize the unfairness of the Ninth Circuit's approach. Petitioner challenged the Secretary's termination on numerous grounds, not the least of which was the ALJ's plainly erroneous conclusion that petitioner had returned to substantial gainful employment. *Compare* ALJ's Decision, AR 13, *with* AR 125-26. Most of the reasons presented by petitioner in the district court for outright reversal -- which we believe was warranted -- had nothing to do with the Secretary's standard in medical improvement cases. *See generally* Memorandum of Points and Authorities in Support of Plaintiff's Motions, *Petrone v. Heckler*, No. CV 84 2000 ER(T)(C.D. Cal. filed Sept. 21, 1984). Petitioner also argued that the Secretary had ordered a cessation of benefits in violation of *Patti v. Schweiker*, 669 F.2d 582 (9th Cir. 1982), a case not inconsistent with the balance ultimately struck in the Reform Act. Thus, under *Patti* alone, it appears almost certain that petitioner would have obtained an outright

reversal, or at least a remand, regardless of whether the Reform Act had been enacted.

In fact, the Secretary has conceded that the ALJ's decision was probably erroneous and would have required a remand under binding case law that pre-dated the Reform Act. *See* Brief for Appellee [Secretary] at 6 n.6, *Petrone v. Sullivan*, No. 89-55732 (9th Cir. filed Dec. 27, 1989). The Secretary has also made clear that petitioner's reinstatement resulted from consideration of her age and her many years out of the work force (*id.* at 13) -- factors that petitioner had argued required reversal, and that have nothing to do with the standards set out in the Reform Act. The point here, of course, is not so much that petitioner would have won absent the Reform Act -- although that is her position -- but that the court of appeals did not even consider that possibility, thus undermining the beneficent purposes of both the Reform Act and the EAJA.

3. The court of appeals' decision is also inconsistent with the prior rulings of this Court defining a "prevailing party" for fee-shifting purposes. In *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), the Court made clear that a plaintiff is considered a prevailing party whenever he or she succeeds on any significant issue in the litigation that achieves some of what was sought in bringing the suit. Having received more than two years of disability benefits that petitioner would have lost had she not filed suit, this standard has been met here, as it was in the other Reform Act cases. *See also Texas State Teachers Ass'n*, 489 U.S. at 792-93 (plaintiff has prevailed if material relationship between parties altered); *Guglietti*, 900 F.2d at 405 (Breyer, J., dissenting). The $10,000 award in petitioner's favor was surely the "stuff of which legal victories are made." *Hewitt*, 482 U.S. at 760.

This Court has also considered the effect of events outside the courtroom on this traditional "prevailing party" formulation. In *Maher v. Gagne*, 448 U.S. 122 (1980), the Court held that a plaintiff prevails for attorney's fees purposes when a case is settled favorably, provided that his or her claims were sufficiently substantial to support federal jurisdiction. *Id.* at 131 (*citing Hagans v. Lavine*, 415 U.S. 528 (1974)); *accord Maher*, 448 U.S. at 134

(Powell, J., concurring). It would be ironic indeed if a settled case could result in fees simply where the underlying claim is non-frivolous, but that a clearly meritorious claim, such as petitioner's, could *never* result in an award of fees, as the Ninth Circuit has held here.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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November 7, 1991

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOAN PETRONE, *Plaintiff-Appellant,*	)	No. 89-55732
v.	)	D.C. No. CV-84-2000-ER
SECRETARY OF HEALTH AND HUMAN SERVICES, *Defendant-Appellee.*	)	OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
December 4, 1990-Pasadena, California

Filed June 14, 1991

Before: J. Clifford Wallace, Chief Judge,
Diarmuid F. O'Scannlain and Pamela Ann Rymer, Circuit Judges.

Per Curiam

OPINION

PER CURIAM:

Petrone timely appeals from a district court order denying his [sic] petition for attorney fees under the Equal Access to Justice

Act, 28 U.S.C. § 2412 (EAJA). The district court had jurisdiction pursuant to 42 U.S.C. § 405(g). We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we find Petrone is not a prevailing party within the meaning of the EAJA, we affirm.

I

In 1966 and again in 1976, Petrone applied for disability insurance benefits and supplemental security income benefits. She was awarded these benefits and received them until December 1982, when the Secretary of Health and Human Services (Secretary) determined her eligibility had ceased. Petrone appealed to an administrative law judge, who affirmed the Secretary's determination. The appeals council also affirmed, and Petrone then sought judicial review in the district court.

While her case was pending in the district court, Congress enacted the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (Reform Act). The Reform Act required the district court to remand Petrone's case to the Secretary for reconsideration in light of new eligibility standards. *See id.* at 1797-98 (mandating the remand of all actions seeking judicial review of termination decisions relating to "medical improvement" pending on September 19, 1984). Applying the new standards on remand, the Secretary reinstated Petrone's benefits through August 1984. Petrone then timely filed a petition for attorney fees pursuant to the EAJA.

II

The EAJA provides for an award of attorney fees to a prevailing party in a civil action brought against the United States, unless the position of the United States was substantially justified or unless special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A). The question presented by Petrone's appeal is whether a plaintiff whose victory results from a change in the law is a prevailing party within the meaning of the EAJA. Although an order granting or denying attorney fees under the EAJA is reviewed for an abuse of discretion, the question before us is solely legal, subject to de novo review. *See Kali v. Bowen*, 854 F.2d

329, 331 (9th Cir. 1988).

The question has been previously open in this circuit. However, in *Andrew v. Bowen*, 837 F.2d 875 (9th Cir. 1988), we considered a similar issue: whether a plaintiff who settles before final judgment can be a prevailing party. We required a "clear causal relationship" between the litigation and the settlement. *Id.* at 877, *quoting McQuiston v. Marsh*, 790 F.2d 798, 800 (9th Cir. 1986). We therefore require a clear causal relationship between Petrone's lawsuit and her reinstatement of benefits.

[1] Two theories have been suggested to fulfill the causation requirement. First, Petrone asserts, correctly, that she would not have qualified for mandatory remand if her lawsuit had not been filed. *See* Reform Act, 98 Stat. at 1797. But Petrone did not win reinstatement in the courtroom; she won because Congress changed the law. "[Petrone] was a fortuitous beneficiary, and serendipity is not a reason for rewarding lawyers." Hendricks v. Bowen, 847 F.2d 1255, 1259 (7th Cir. 1988) (Hendricks) (Easterbrook, J., concurring).

[2] Second, she asserts that her lawsuit, and others like it, provided a "catalyst" for congressional action. This contention is far too speculative to receive recognition. There is no record in this case from which we could divine congressional motivations. Even if we assumed that lawsuits such as this one catalyzed the Congress, no clear causal relationship can be shown to this particular suit. Accordingly, we hold Petrone is not a prevailing party within the meaning of the EAJA.

[3] Petrone argues that attorney fees may be awarded because, but for the intervention of the Reform Act, she would have been awarded fees; therefore, we should remand for a fee determination hearing. We disagree. We recognize this holding may be inconsistent with *Perket v. Secretary of Health and Human Services*, 905 F.2d 129, 133-34 (6th Cir. 1990), *Rhoten v. Bowen*, 854 F.2d 667, 670 (4th Cir. 1988), and *Robinson v. Bowen*, 679 F. Supp. 1011, 1014-15 (D. Kan. 1988), *aff'd per curiam*, 867 F.2d 600 (10th Cir. 1989). We are persuaded, however, by the earlier and better view of the First, Seventh, and Eighth Circuits, rejecting an award of

attorney fees in these circumstances. *See Guglietti v. Secretary of Health and Human Services*, 900 F.2d 397, 400-03 (1st Cir. 1990); *Hendricks*, 847 F.2d at 1258; *Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988).

AFFIRMED.

O'SCANNLAIN, Circuit Judge, dissenting:

I respectfully dissent.

I

As a general rule, disability benefits may be terminated when evidence shows that the disability has ceased. See 42 U.S.C. § 423(f). Prior to 1980, the Secretary of the Department of Health and Human Services employed the "medical improvement" standard to make this determination; under this standard, the Secretary would not find that a disability had ceased unless the claimant's condition had improved since the last determination of disability. *Rhoten v. Bowen*, 854 F.2d 667, 668 (4th Cir. 1988). In 1980, the Secretary announced that he had abandoned the medical improvement standard and, in its place, established a "current disability" standard pursuant to which benefits were terminated if it was found, on the basis of new evidence, that the person was not presently disabled. *Id.*

Many Social Security disability benefit recipients filed suit in federal courts challenging the new regulations. *See, e.g., Johnson v. Heckler*, 606 F. Supp. 82 (S.D.N.Y. 1984); *Turner v. Heckler*, 592 F. Supp. 599 (N.D. Ind. 1984); *Graham v. Heckler*, 573 F. Supp. 1573 (N.D. W. Va. 1983); *Lopez v. Heckler*, 572 F. Supp. 26 (C.D. Cal. 1983). Thereafter, prompted at least partially by these numerous district court actions, Congress enacted the Social Security Disability Benefits Reform Act of 1984 ("Reform Act"). *See Rhoten*, 854 F.2d at 669 & n. 1. The Reform Act did not establish a presumption of continuing disability. However, it did provide that terminations must be based on substantial evidence of medical improvement. In addition, the Reform Act specifically provided for automatic remand of all requests for judicial review

pending on September 19, 1984. *See id.*

Unfortunately, Congress apparently did not consider the relationship between this automatic remand provision and the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. Needless to say, claimants whose benefits were restored upon remand sought attorney's fees under the EAJA. Courts have since grappled with the question of whether such claimants are "prevailing parties" within the meaning of the EAJA.[1] Three theories have been proposed. Under the first theory, claimants who received benefits as a result of the Reform Act's automatic remand provision can never be prevailing parties, as the "clear causal relationship" between the lawsuit and the relief is lacking. In addition to the majority here, this reasoning has been endorsed by the First Circuit, *see Guglietti v. Secretary of HHS*, 900 F.2d 397 (1st Cir. 1990), the Seventh Circuit, *see Hendricks v. Bowen*, 847 F.2d 1 255 (7th Cir. 1 988), and the Eighth Circuit, *see Truax v. Bowen*, 842 F.2d 995 (8th Cir. 1988).

The second theory is the obverse of the first; under this view, a claimant may be a prevailing party for purposes of the EAJA simply by bringing the lawsuit that enabled retroactive application of the Reform Act. *See Perket v. Secretary of HHS*, 905 F.2d 129 (6th Cir. 1990); *Guglietti*, 900 F.2d at 405-08 (Breyer, J., dissenting). The rationale for this viewpoint was encapsulated by Judge Breyer.

> In my view, the following circumstances make it proper, as a matter of ordinary English usage, as well as a matter of law, to say that the claimant "prevailed" in her legal action. First, she did get the relief she wanted. Second, her legal action was a necessary condition for her obtaining it. . . . Third, the outside event - the Congressional action - was not an unrelated, extra-

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[1] In order to receive attorney's fees under the EAJA, the requester must be a prevailing party, the government's position cannot be substantially justified, and no special circumstances may exist that would make such an award unjust. *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1230 (9th Cir. 1990).

> judicial event. Rather, Congress acted, in part, because this claimant, and other claimants similarly situated, had filed lawsuits.

Guglietti, 900 F.2d at 405 (Breyer, J., dissenting) (citations omitted).

The third theory is an intermediate approach, aptly entitled as the "inevitable victory" theory. *See Perket*, 905 F.2d at 133. Under this theory, a claimant is a prevailing party under the EAJA if she would have otherwise prevailed in the absence of the Reform Act. *Id.*; *see also Lopez v. Sullivan*, 882 F.2d 1533, 1537 (10th Cir. 1989); *Rhoten*, 854 F.2d at 670; *Hendricks*, 847 F.2d at 1259 (Easterbrook, J., concurring) ("An award is both appropriate and necessary when the claimant would have prevailed in his quest for benefits, and would have recovered fees, had the Reform Act never existed.").

It is this latter approach which I believe we should adopt today. This approach avoids the problem of rewarding lawyers for mere "serendipity." *See Hendricks*, 847 F.2d at 1259 (Easterbrook, J., concurring). However, it also avoids the equally unfortunate result of failing to compensate claimants who have brought meritorious lawsuits. *See id.* at 1261 ("When the EAJA otherwise would have required the government to pay, . . . the creation of a new entitlement in the Reform Act should not make the claimants worse off."). Indeed, this approach best harmonizes Congress's objectives in both the Equal Access to Justice Act and the Disability Benefits Reform Act.

II

In the present case, the district court concluded that a disability claimant who received benefits as a result of passage of the Reform Act could not be a prevailing party under the EAJA. Applying the "inevitable victory" theory, I would remand this case to the district court to determine whether Petrone would have prevailed in the absence of the Reform Act. If so, the district court should next determine whether the government's position was not substantially justified. If both of these inquiries are resolved in

Petrone's favor, I believe she should be entitled to attorney's fees under the Equal Access to Justice Act.

FILED

APR 10, 1989

CLERK, S. DISTRICT
CENTRAL

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOAN PETRONE, Plaintiff, v. OTIS R. BOWEN, M.D., Secretary of Health and Human Services, Defendant.	)	No. CV 84-2000-ER(T) REPORT AND RECOMMENDATION RE MOTION FOR ATTORNEY'S FEES UNDER THE EAJA

This Report and Recommendation is submitted pursuant to the provisions of 28 U.S.C. §636(b)(1)(B) and General Order No. 194 of the United States District Court for the Central District of California.

Plaintiff, through counsel, has filed a Motion for Attorney's Fees seeking an award under the Equal Access to Justice Act

(hereinafter "EAJA"), 28 U.S.C. § 2412(d). Defendant, the Secretary of Health and Human Services, has filed an opposition to the plaintiff's motion.

Oral argument in the matter was held before the Magistrate on March 20, 1989.

BACKGROUND

Plaintiff applied for disability insurance benefits in February, 1966 and was found disabled. (Administrative Record, hereinafter "A.R.," pages 76-81). Plaintiff applied for Supplemental Security Income (hereinafter "SSI") benefits in December, 1976 and was, again, found disabled and entitled to benefits. (A.R. 11-82). Based upon a continuing disability review, the Secretary found that plaintiff's disability had ceased as of October, 1982 and her benefits were terminated at the close of December, 1982. (A.R. 106). Plaintiff appealed the Secretary's decision. An administrative Searing was conducted in April, 1983. After the hearing, but prior to the issuance of the decision of the Administrative Law Judge (hereinafter "ALJ"), plaintiff was advised of her options to seek another review of her case as

required by this District Court's decision regarding continuing disability reviews. (A.R. 15-16). Plaintiff elected to continue with the hearing process. (A.R. 120). By decision dated October 19, 1983, the ALJ found that plaintiff's condition had improved and that her disability had ceased as of October, 1982. (A.R. 13-14). Plaintiff sought review of the ALJ's decision and the Social Security Appeals council affirmed the ALJ by decision dated February 27, 1984. (A.R. 3-4). Plaintiff then sought judicial review of the Secretary's decision.

Plaintiff filed a Complaint in this Court seeking review of the Secretary's unfavorable decision and defendant answered the Complaint. The Court ordered the parties to submit motions for summary judgment. Plaintiff filed a Motion for Summary Judgment arguing that the Secretary's decision was not supported by substantial evidence. Defendant requested and received an extension of time to determine the effect of the Social Security Disability Benefits Reform Act of 1984, Pub.L. No. 98-460, 98 Stat. 1794 (1984), (hereinafter "the Reform Act"). The Secretary determined that the case was affected by the Act and required

review of plaintiff's case under new medical improvement standards. Defendant submitted a proposed stipulation to remand the case for further proceedings to plaintiff's counsel. Plaintiff's counsel agreed to the remand of the case, and the court ordered the case remanded.

Upon remand, plaintiff's claim to benefits was not only reviewed under the provisions concerning medical improvement, but also under Section 5(c) of the Reform Act, providing for new mental impairment regulations. (See Defendant's Opposition, Exh. A.) The Secretary issued a partially favorable decision on November 2, 1988. Plaintiff's disability benefits were resumed effective December, 1982. However, no benefits were payable after November, 1984 because of plaintiff's work activity and earnings. Plaintiff's disability benefits were terminated, effective May, 1985, because the Secretary determined that plaintiff was able to work. As to plaintiff's recovery, a prior overpayment of Six Thousand Five Hundred and Eleven Dollars ($6,511.00) was recovered and plaintiff received a check for Two Thousand Six Hundred and Ninety-Two Dollars and Fifty Cents ($2,692.50).

(See Judgment, Exh. A). The District Court entered a Judgment for plaintiff on February 9, 1989, reflecting the disposition of the case.

Plaintiff, through counsel, now moves this Court for an attorney's fee award of Five Thousand Six Hundred and Thirty-Five dollars and Fifty Cents (5,635.50) under the EAJA. Plaintiff's counsel, petitioner herein, alleges that the requested award represents 47.56 hours at an hourly rate of One Hundred Twelve dollars and Fifty Cents ($112.50); Sixty Dollars ($60.00) for payment of the Court's filing fee; and, Two Hundred Twenty-Five Dollars ($225.00) for the two hours needed for preparation of the instant motion. Defendant opposes plaintiff's Motion for Attorney's Fees under the EAJA.

DISCUSSION

Under the EAJA, the Court must award fees to a prevailing party unless the government can demonstrate that its position was "substantially justified" or that special circumstances would make a fee award unjust. 28 U.S.C. § 2412(d)(1)(A).

A. Prevailing Party Status

The threshold inquiry in any claim to attorney's fees under the EAJA is whether the party seeking fees is a prevailing party. That inquiry is particularly difficult in the instant case because plaintiff succeeded in this action, not because of the issues raised in her Motion for Summary Judgment, but because her case was remanded at the request of the defendant and reviewed under the new standards established by the Reform Act.

The Ninth Circuit Court of Appeals has not addressed the specific issue of whether a successful remand mandated by the Reform Act qualifies a plaintiff as a prevailing party. Other federal courts of appeals decisions, using a "catalyst" or causation" theory, have found that a plaintiff who is successful on remand due to review under the Reform Act is not a prevailing party. See Hendricks v. Bowen, 847 F.2d 1255, 1258 (7th Cir. 1988); Truax v. Bowen, 842 F.2d 995, 997 (8th Cir. 1988). The decisions of the district courts on this issue have varied. Compare Cruz v. Bowen, 668 F.2d 669, 673-74 (Utah 1987) (litigant not prevailing party); McCarroll v. Bowen, 661 F.Supp. 1163, 1164 (N.J. 1987) (same); Mathus v. Bowen, 661 F.Supp. 241, 242 (N.D.

Ill. 1987) (same) with Robinson v. Bowen, 679 F.Supp. 1011, 1014-15 (Kan. 1988) (litigant was prevailing party); Gruber v. Bowen, 673 F.Supp. 970, 973-74 (W.D. Wis. 1987) (same); Vitale v. Secretary of Health and Human Services, 673 F.Supp. 1171, 1177 (N.D. N.Y. 1987) (same).

The only Ninth Circuit cases to discuss prevailing party status under the EAJA within the social security benefits context have been those cases where the case has not yet gone to final judgment. See Escobar v. Bowen, 857 F.2d 644 (9th Cir. 1988);[1] Andrew v. Bowen, 837 F.2d 875 (9th Cir. 1988);[2] Swensen v.

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[1] Escobar concerned an overpayment allegation where plaintiff was successful in obtaining a remand of the case based upon her allegation that she was deprived of her right to counsel at the administrative hearing. However, she was not yet successful on the merits of the action. The court found that she was not a successful party because "even a significant procedural victory which implicates substantive rights is not sufficient to make a party a prevailing party under EAJA." Escobar, 857 F.2d at 646, relying on NLRB v. Doral Guilding Services, Inc., 680 F.2d 647 (9th Cir. 1982).

[2] In Andrew, plaintiffs filed a class action seeking to enjoin the Secretary from utilizing his procedural manuals which operated to deny Supplemental Security Income ("SSI") benefits to individuals owning Alaskan commercial fishing permits. The District Court granted a preliminary injunction. Since the Secretary then published regulations which found that commercial fishing licenses were explicitly excluded from a determination of income, the plaintiffs in Andrew requested that the Court dismiss the action. The District Court dismissed their action and plaintiffs sought EAJA fees. Reversing the District Court's decision denying the fee request on substantial evidence grounds, the Ninth Circuit found that the plaintiffs were prevailing parties because they secured the relief they sought in bringing suit and because there was a legal basis for plaintiffs' claims. Andrew, 837 F.2d at 875.

Heckler, 801 F.2d 1079 (9th Cir. 1986.[3]

While these cases are not directly on point since there has been a final judgment in plaintiff's case, the Court's analysis in Andrew is instructive. In Andrew, the Court found that a two-part test for determining prevailing party status when a case has not yet gone to final judgment was acceptable. A party seeking to establish prevailing party status must demonstrate that: (1) as a factual matter, the relief sought by the lawsuit was in fact obtained as a result of having brought the action; and, (2) there was a legal basis for the plaintiff's claim. Andrew, 837 F.2d at 877, citing California Association of Physically Handicapped, Inc. v. FCC, 721 F.Sd 667, 671-72 (9th Cir. 1983), cert. denied, 469 U.S. 832, 105 S.Ct. 121, 83 L.Ed.2d 63 (1984).

Under the first level of inquiry, the Court must identify what the lawsuit originally sought to accomplish and what relief was actually obtained. Id. The Court must then determine whether

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[3] In Swenson, plaintiff had secured a remand from the District Court to allow the Secretary an opportunity to rebut plaintiff's prima facie case of disability. Before the remand process was completed, plaintiff applied for EAJA fees. Relying on the Ninth Circuit's decision in Escobar Ruiz v. INS, 787 F.2d 1284 (9th Cir. 1986), the Court found that plaintiff was not a prevailing party. Swenson, 801 F.2d at 1080.

there exists a "clear causal relationship between the litigation brought and the practical outcome realized." McQuiston v. Marsh ("McQuiston II"), 790 F.2d 798, 800 (9th Cir. Cir. 1986) (citing American Constitutional Party v. Munro, 650 F.2d 184, 188 (9th Cir. 1981)). Andrew, 837 F.2d at 877.

Under the second inquiry, the Court determines whether there was a legal basis for the claim. This inquiry requires a limited review of the merits to determine whether the claims asserted are "frivolous, unreasonable, or groundless, or [whether] the plaintiff continued to litigate after [they] became so. Andrew, 837 F.2d at 878, quoting Ortiz de Arroyo v. Barcelo, 765 F.2d 275, 282 (1st Cir. 1985).

The first inquiry, requiring a causal relationship, is consistent with other Ninth Circuit decisions where the case had gone to final judgment but some intervening act put into question whether the party seeking fees was a prevailing party. See Oregon Environmental Council v. Kunzman, 817 F.2d 484, 497 (9th Cir. 1987) (inquiry whether suit was "at least a material factor or played a catalytic role in bringing about the desired result"); Ward

v. County of San Diego, 791 F.2d 1329, 1334 (9th Cir. 1986) (a clear, causal relationship between the litigation brought and the practical outcome realized required).

The standard used by the Ninth Circuit is nearly identical to the standard used by those federal courts of appeals decisions which have decided the issue of prevailing party status after a successful remand based on the Reform Act. See Hendricks, 847 F.2d at 1258 (lawsuit must play "provactive role" in securing result); Truax, 842 F.2d at 997 ("catalyst approach").[4]

In the instant case, remand was ordered on request of the Secretary pursuant to the mandate of the Reform Act and not pursuant to the relief plaintiff had originally requested. The Court did not make even a preliminary determination of the adequacy of the Secretary's denial of plaintiff's benefits or the substantiality of the evidence supporting the Secretary's decision.

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[4] The standard established by the various circuit courts of appeals is not so far afield from the ordinary determination of prevailing party status in a non-social security case context. In Hensley v. Eckerhart, a case involving a fee request under 42 U.S.C. § 1988, the United States Supreme Court noted that a typical formulation of the "prevailing party" standard is that "plaintiffs may be considered 'prevailing parties' for attorney's fee purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1938) [sic: 1983].

In fact, a review of the issues raised by the plaintiff's Motion for Summary Judgment reveals no challenge to either the Secretary's standards for finding medical improvement or the Secretary's mental health regulations. Plaintiff requested remand of her case but not for review under new standards. Rather, she requested remand for consideration of new and material evidence.

Under such circumstances, it cannot be found that plaintiff's suit has played a catalytic role, was a material factor, or even established a causal relationship with plaintiff's receipt of benefits after remand. As defendant has noted, the Secretary's decision that plaintiff had improved was eventually enforced. Therefore, under the circumstances of this case, the Magistrate finds that plaintiff is not a prevailing party as required by the EAJA.

B. Substantial Justification, Special Circumstances, and Excessive Fees

Because the Magistrate finds that plaintiff has not established that she is a prevailing party, it is unnecessary to address the other issues presented by the Motion for Attorney's Fees, i.e., the

substantial justification of the government's position, special circumstances making an award unjust, and plaintiff's counsel's request for an hourly fee of One Hundred Twelve Dollars and Fifty Cents ($112.50).

CONCLUSION

The Magistrate concludes that plaintiff is not a prevailing party and is not, therefore, entitled to attorney's fees under the EAJA.

Accordingly, the Magistrate recommends that the plaintiff's Motion for Attorney's Fees under the EAJA be denied.

DATED: April 10, 1989

/s/
VENETTA S. TASSOPULOS
United States Magistrate

LODGED

APR 10 1989

CLERK, U.S. District
CENTRAL DISTRICT OF C
BY

FILED

MAY 18 1989

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOAN PETRONE, Plaintiff v. SECRETARY OF HEALTH AND HUMAN SERVICES, Defendant.	)	No. CV 84-2000-ER(T) ORDER RE ATTORNEY'S FEES

The Court has reviewed the Motion for Attorney's Fees under the Equal Access to Justice Act, the attached Report and Recommendation of Magistrate, and the objections thereto.

IT IS ORDERED that the Motion for Attorney's Fees under the Equal Access to Justice Act is denied.

IT IS FURTHER ORDERED that the Clerk shall serve

copies of this Order and the Report and Recommendation of Magistrate by United States mail on counsel for the parties herein.

DATED: May 18, 1989

/s/
EDWARD RAFEEDIE
United States District Judge

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

ENTERED

MAY 24 1989

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CAL

FILED

AUG 12 1989

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOAN PETRONE,	)	No. 89-55732
	)	
Plaintiff-Appellant,	)	D.C. No.
	)	CV-84-2000-ER
vs.	)	
	)	
SECRETARY OF HEALTH AND HUMAN SERVICES,	)	ORDER DENYING
	)	PETITION FOR
Defendant-Appellee.	)	REHEARING
	)	

Appeal from the United States District Court
for the Central District of California

Before: WALLACE, Chief Judge, O'SCANNLAIN and RYMER, Circuit Judges.

Judges Wallace and Rymer have voted to deny the

petition for rehearing. Judge O'Scannlain has voted to grant the petition for rehearing. The panel has voted unanimously to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
BRIAN C. KIPNIS
Assistant United States Attorney

ENTERED
CLERK, U.S. DISTRICT COURT
FEB 9 1989
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

1100 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 894-2439

Attorneys for Defendant

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JOAN PETRONE, Plaintiff, v. OTIS R. BOWEN, M.D., Secretary of Health and Human Services, Defendant.	No. CV 84-2000-ER(T) JUDGMENT; RECOMMENDATION OF MAGSTRATE; AND ORDER THEREON

The Court, having remanded this matter to the Secretary of Health and Human Services for further proceedings; and it appearing to the Court that the Secretary has issued a determination partially favorable to plaintiff, a copy of which is attached hereto as Exhibit A; now, therefore, IT IS HEREBY ORDERED that Judgment is entered in favor of plaintiff affimring the Secretary's determination that plaintiff's disability ceased in August 1984 and that her eligibility for benefits ceased effective

November 1985, upon expiration of her reentitlement period, under the provisions of sections 216(i) and 223 of the Social Security Act, as amended.

DATED: This 30 day of January, 1989

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

By /s/
BRIAN C. KIPNIS
Assistant United States Attorney

RECOMMENDATION OF MAGISTRATE

IT IS SO RECOMMENDED this 31st day of January, 1989.

/s/ Vanetta S. Tassopulos
UNITED STATES MAGISTRATE

ORDER

IT IS SO ORDERED this 7 day of February, 1989.

/s/ Edward Rafeedie
UNITED STATES DISTRICT
JUDGE

[EXHIBIT A]

SOCIAL SECURITY ADMINISTRATION

Northeastern Program Service Center
Flushing, New York 11368

Date: November 2, 1988

Claim Number : 083-20-2602 HA

Joan Petrone
9001 Rangely Av
Los Angeles CA 90048

Your disability benefits have been resumed effective December 1982. Your rates are as follows:

December 1982	$432.70
December 1983	447.80
December 1984	483.40

Effective November 1984 no benefits are payable due to your work and earnings. Effective May 1985 your disability benefits have been stopped because we have decided you are now able to work.

Your prior overpayment of $6,511.00 has been recovered from benefits due you.

You will receive a check for $2,692.50 which represents all benefits due you through October 1984.

When a lawyer wants to charge for helping with a Social Security claim, we must first approve the fee. We usually withhold 25 percent of past due benefits in order to pay the approved lawyer's fee. We withheld $897.50 from your past due benefits in case we need to pay your lawyer.

* If all the work on this case for you and your family is finished, and your lawyer wants to charge a fee, a request to have it approved should be sent to us right away.

* If all work is not finished in this case, the lawyer should let us know that a fee will be charged. This must be done within 60 days of the date of this letter.

* If the lawyer will not charge a fee, a statement saying so, signed and dated by the lawyer, should be sent to us instead.

SEE NEXT PAGE

Encl: SSA 10153

When the amount of the fee is decided, we will let you and the lawyer know how much of this money will be used to pay the fee. We will send any remainder to you. If the approved fee is more than the money we have withheld, the Social Security Administration is not involved in paying the rest of the fee.

Any petition for a fee should be sent to:

Attorney Fee Staff
OHA, SSA
P O Box 3200
Arlington VA 22203

We are sending a copy of this letter to: John O'Hanian, Inc.

If you think we are wrong, you have the right to appeal. We will correct mistakes. We will look at any new facts you have. Then

a person who did not make the first decision will decide your case again.

* You have 60 days to ask for an appeal.
* The 60 days start the day after you get this letter.
* You will have to have a good reason for waiting more than 60 days to ask for an appeal.

If you have any questions, you should call, write or visit any Social Security Office. If you visit an office, please bring this letter. It will help us answer your questions.

Martin Taffet
Director
Northeastern Program Service Center

L690
M27/rf

cc: Attorney Fee Staff
OHA, SSA
P O Box 3200
Arlington VA 22203

John O'Hanian Inc
548 S Spring St
Suite 1034
Los Angeles CA

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration

CESSATION OR CONTINUANCE OF DISABILITY OR BLINDNESS DETERMINATION AND TRANSMITTAL

TITLE II

1. A. SOCIAL SECURITY NUMBER: 083 | 20 | 2602 — BIC: A

No further monies or other benefits may be paid out under this program unless this report is completed and filed as required by existing public law 93-233

1. B. TYPE CLAIM: [X] DIB [ ] FZ [ ] DWB [ ] CDB [ ] ESRD [ ] HIB

1. C. OTHER ENTITLEMENT: [ ] TITLE II [X] TITLE XVI

2. A. NAME OF PAYEE (IF ANY)

3. WE'S NAME (IF CDB OR DWB CLAIM)

B. NAME OF DISABLED OR BLIND INDIVIDUAL: Joan [illegible] Pet [illegible] rone

4. DATE OF BIRTH: 01-17-27

5. DATE DISABILITY BEGAN: 07-31-63

C. ADDRESS: 9001 Rangely Av
Los Angeles Ca 90036

6. DO ADDRESS: 641 S La Brea Av
Los Angeles Ca 90036

7. DO CODE: D42 — DOS CODE: 052

8.
A. [X] INITIAL B. [ ] RECON C. [ ] RECON DHU D. [ ] ALJ HEARING E. [ ] APPEALS COUNCIL F. [ ] U.S. DISTRICT COURT G. [ ] REOPENING

9. UPON CONSIDERATION OF ALL FACTS, IT IS DETERMINED [X] DISABILITY [ ] IMPAIRMENT SEVERITY (EPE MEDICAL REVIEW ONLY)

		MONTH	YEAR
	A. CONTINUES		
X	B. CEASED	~~12~~ 08	~~84~~ 84
	C. PERIOD OF DISABILITY TERMINATED AT THE CLOSE OF THE LAST DAY OF	~~02~~	~~85~~
X	D. EPE BEGIN MONTH	~~12~~ 02	~~84~~ 84
	E. EPE REINSTATEMENT ALLOWED		
	F. EPE REINSTATEMENT DENIED		
	G. EPE SUSP. AFTER REINSTATEMENT		
X	H. EPE BENEFIT TERMINATION MONTH	05	85

		MONTH	YEAR
	I. 30% CASE		
	J. BLINDNESS		
	(1) CONTINUES		
	BEGAN		
	(a) DISABLED FOR CASH PURPOSES SINCE		
	(b) NOT DISABLED FOR CASH BENEFIT PURPOSES SINCE		
	(2) CEASED		
	(3) CEASED OTHER IMPAIRMENT BEGAN		

10. BASIS FOR DETERMINATION
A. [ ] MEDICAL/MEDICAL VOC B. [X] WORK—NO IRWE C. [ ] WORK—IRWE INVOLVED D. [ ] OTHER (Explain in Item 24)

11. REASON FOR CESSATION — CODE: 18

12. REASON FOR CONTINUANCE — CODE:

MEDICAL LIST NO.

13. [X] CHECK IF ATTACHING A CONTINUATION SHEET.

14. [ ] CHECK IF VOCATIONAL RULE MET. CITE RULE

15. VOCATIONAL BACKGROUND: ~~20-01~~ 15-78

16. CCC. YEARS: 14

17. EDUC. YEARS: 12

18. SPECIAL USE

19. VR ACTION
A. [ ] SC IN B. [ ] SC OUT C. [ ] PREV. REF. D. [ ] RE-REF.

20. WHY REVIEW WAS MADE—CODE: ~~01~~ 12

21. PRIMARY DIAGNOSIS: BODY SYSTEM 12 — CODE NO. 2950
SCHIZOPHRENIA, PARANOID AND OTHER FUNCTIONAL PSYCHOTIC DISORDERS

22. SECONDARY DIAGNOSIS: NONE — CODE NO. 0000

23. DIARY

A. TYPE	B. MONTH	B. YEAR	C. REASON

24. REMARKS:
TWP II 00/67, 00/68, 00/70, 02-05/83, 12/83, 01/84
~~EPE~~ 02/84-04/85
UWA: 05-04/84, 6/84
field

MULTIPLE IMPAIRMENTS CONSIDERED
24.A. COMBINED MULTIPLE NONSEVERE—SEVERE
24.B. COMBINED MULTIPLE NONSEVERE—NONSEVERE

25. DISABILITY EXAMINER/SSR REP.: agolden M Guldman

26. DATE: 04/28/86

27. PHYSICIAN OR MEDICAL SPEC. SIGNATURE

28. DATE

29. LETTER/PARAGRAPH NUMBER: 222 399

30. PHYSICIAN OR MEDICAL SPEC. NAME (STAMP, PRINT, OR TYPE)

30.A. SPEC. CODE

31. SSA REPRESENTATIVE

32. SSA CODE: 01

33. DATE: 08/05/88

34. LIST NUMBER: A. B. C. D. E. F.

35. FOLDER SENT TO

29a

FORM SSA-833-U5 (6-86) Destroy Prior Editions

EXHIBIT A (page 3 of 3)

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(2)

No. 91-760

FILED
JAN 8 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1991

JOAN PETRONE, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a social security claimant whose disability benefits are reinstated following a remand and re-adjudication required by the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, is a prevailing party for purposes of an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 936 F.2d 428. The opinion of the district court (Pet. App. 20a-21a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1991. A petition for rehearing was denied on August 12, 1991 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on November 7, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner received disability insurance benefits and supplemental security income benefits based on applications filed in 1966 and 1976. Pet. App. 2a. In December 1982, the Secretary of Health and Human Services concluded that petitioner's medical condition had improved so that she was no longer disabled, and therefore terminated benefits. Pet. App. 10a. Petitioner sought administrative review, but the Secretary's ruling was upheld at all administrative levels. Pet. App. 2a. Petitioner then filed this action seeking judicial review of the Secretary's final decision that she was no longer entitled to benefits. While petitioner's case was pending in district court, Congress passed the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794. Pet. App. 2a. That Act required the remand of all pending benefit termination cases to the Secretary for readjudication under a newly enacted medical improvement standard. Pub. L. No. 98-460, § 2(a) and (d)(2)(C), 98 Stat. 1794, 1797-1798. Petitioner's suit was remanded as required by the Reform Act, and the Secretary, applying the new statutory standard, reinstated petitioner's benefits through November 1984. Pet. App. 11a, 26a.[1]

2. Petitioner filed an application for attorney fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A), which provides for the recovery under certain circumstances of attorney fees

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[1] No benefits were payable to petitioner after November 1984 because of her earnings; disability payments were stopped effective May 1985 because the Secretary concluded that petitioner was no longer disabled. Pet. App. 11a, 26a. Petitioner apparently does not challenge these conclusions. Pet. 3-4. The termination date of petitioner's benefits is incorrectly stated in the court of appeals decision (Pet. App. 2a).

by a party who prevails in a civil suit against the government when the government's position is not substantially justified. Adopting the United States Magistrate's recommendation that an EAJA fee be denied because petitioner was not a prevailing party (Pet. App. 8a-19a), the district court denied the fee request (Pet. App. 20a-21a). The court of appeals affirmed (Pet. App. 1a-7a). The appellate court, applying a de novo standard of review because the issue is a purely legal one (Pet. App. 2a-3a), concluded that petitioner was not a prevailing party under EAJA. The court applied prior circuit precedent defining a prevailing party as one who can show "a clear causal relationship" between the litigation and the successful outcome of the dispute (Pet. App. 3a). Petitioner failed to come within this definition, the court explained, because she "did not win reinstatement in the courtroom; she won because Congress changed the law. '[She] was a fortuitous beneficiary, and serendipity is not a reason for rewarding lawyers.' " *Ibid.*, quoting *Hendricks* v. *Bowen*, 847 F.2d 1255, 1259 (7th Cir. 1988) (Easterbrook, J., concurring).

The court rejected petitioner's argument that her suit was one of those providing a "catalyst" for the congressional action as "far too speculative to receive recognition;" even assuming Congress could be catalyzed by such lawsuits, "no clear causal relationship can be shown to this particular suit." Pet. App. 3a. The court also rejected petitioner's argument that the case should be remanded for a hearing to determine whether she was entitled to a fee because, but for the intervention of the Reform Act, a fee would have been awarded. Pet. App. 3a-4a. Judge O'Scannlain dissented; he would have remanded for a further

hearing to determine whether, absent the Reform Act, petitioner's victory was "inevitable." Pet. App. 6a.

ARGUMENT

Although there appears to be some disagreement among the circuits on the question presented by petitioner, the decision of the court of appeals in this case is correct, and the issue lacks prospective significance because the narrow class of cases involved is approaching extinction. Accordingly, further review by this Court is not warranted.

1. Petitioner asserts (Pet. 6-8) that the circuits are split on whether prevailing party status is to be accorded claimants who, after filing actions challenging the termination of their benefits, have those benefits reinstated under the remand and readjudication procedures of the Reform Act. Two theories to justify such awards have been advanced.

First, the "catalyst" theory advocated by petitioner has only been accepted by the Sixth Circuit in an alternative holding (*Perket* v. *Secretary of Health & Human Services*, 905 F.2d 129, 134-135 (1990)). All other circuits that have considered this theory have rejected it. Like the Ninth Circuit in the instant case, decisions of the First, Seventh, Eighth and Tenth Circuits would deny recovery under a catalyst theory. *Guglietti* v. *Secretary of HHS*, 900 F.2d 397 (1st Cir. 1990); *Hendricks* v. *Bowen*, 847 F.2d 1255 (7th Cir. 1988); *Truax* v. *Bowen*, 842 F.2d 995 (8th Cir. 1988); *Lopez* v. *Sullivan*, 882 F.2d 1533, 1536 (10th Cir. 1989).

As the *Hendricks* court explained, a claimant successful on remand under the Reform Act could not be considered a prevailing party under a catalyst theory because the "nexus between Congress' action

and [claimant's] suit is too attenuated to conclude that the latter played a 'provocative role' in causing the former." 847 F.2d at 1258. Moreover, the *Hendricks* court found no indication in the legislative history of the Reform Act that Congress contemplated that the remands required by that Act would result in federal fee liability, and concluded that the "lack of Congressional attention to the enormous financial impact of awarding attorneys' fees is evidence that Congress did not intend the EAJA to apply." *Id.* at 1259. Cf. *Truax*, 842 F.2d at 997 ("causal link between [claimant's] individual lawsuit and Congress's action is too tenuous to satisfy the catalyst test"); *Guglietti*, 900 F.2d at 401 (same); *Lopez*, 882 F.2d at 1536 (same); Pet. App. 3a (same).[2]

Second, some courts have accorded prevailing party status to claimants who have had their benefits reinstated under the Reform Act, relying on the "inevitable victory" theory proposed by the dissent below. Under that theory, if a claim would have prevailed absent the Reform Act, the claimant is entitled to EAJA fees. The Eighth Circuit, after finding an insufficient causal link between a claimant's suit and

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[2] The *Hendricks* court also rejected claimant's argument that he prevailed because, but for the lawsuit, there would have been no award of benefits. The court observed that "only in a hypertechnical sense" was the lawsuit the "cause" of victory; the "proximate cause of [claimant's] victory was the congressional enactment of a standard under which he was entitled to relief." *Hendricks*, 847 F.2d at 1258; accord *Guglietti*, 900 F.2d at 400 ("but for" argument "confuses a *condition* of recovery with a *cause* of recovery" and "distorts the EAJA framework"); *Truax*, 842 F.2d at 997; Pet. App. 3a-4a; but see *Hyatt* v. *Heckler*, 807 F.2d 376, 382 (4th Cir. 1986) (apparently accepting "but for" argument), cert. denied, 484 U.S. 820 (1987).

enactment of the Reform Act to support according the claimant prevailing party status in *Truax*, *supra*, later distinguished that case where it found a claimant's victory to have been inevitable (*Gowen* v. *Bowen*, 855 F.2d 613, 617 n.3 (1988)). In factual circumstances distinguishable from the instant case, decisions of the Fourth Circuit, *Rhoten* v. *Bowen*, 854 F.2d 667, 670 (1988); the Sixth Circuit, *Perket*, 905 F.2d at 133-134 (alternative holding); and the Tenth Circuit, *Lopez*, 882 F.2d at 1537, have also approved the award of EAJA fees under an inevitable victory rationale.[3]

---

[3] In *Lopez*, the court first noted that the claim for benefits at issue in that case was *not* controlled by the Reform Act at all, and held that it "therefore * * * need not consider whether a mandatory remand [under the Reform Act] would have precluded prevailing party status for [the claimant]." 882 F.2d at 1535. The court went on, however, to remand for a determination of whether there was substantial evidence to support the original administrative determination that Lopez was not disabled—on the theory that if he would have prevailed under pre-Reform Act law, he would be entitled to an EAJA award. *Id.* at 1537. In *Rhoten*, the court noted that, as a result of plaintiffs' litigative efforts, it had remanded their cases to the Secretary *before* the enactment of the Reform Act. 854 F.2d at 669. Similarly, in *Perket*, the Secretary's denial of benefits was inconsistent with controlling circuit precedent—in the district court, the Secretary simply "challenged the validity" of that precedent. 905 F.2d at 133. In *Rhoten* and *Perket*, the argument that plaintiffs' victories were "inevitable" was thus far stronger than in the instant case, which was simply pending in the district court when the Reform Act was enacted. Cf. Pet. App. 17a-18a ("[t]he [district court] did not make even a preliminary determination of the adequacy of the Secretary's denial of plaintiff's benefits or the substantiality of the evidence supporting the Secretary's [pre-Reform Act] decision. In fact, a review of the issues raised by [petitioner's] Motion for Summary Judgment

We submit that the court of appeals correctly decided that petitioner, whose benefits were reinstated as a result of the administrative reconsideration of her case mandated by the Reform Act, not as a result of her civil suit, is not a prevailing party within the meaning of EAJA. The catalyst theory rests on a highly speculative assumption as to congressional motivation for enacting the Reform Act. The decisions relied upon by the Ninth Circuit explain the fallacy of the inevitable victory rationale. As the *Guglietti* court observed, that rationale improperly consolidates the prevailing party and lack of substantial justification standards, both of which a claimant must satisfy in order to be entitled to an EAJA fee (900 F.2d at 402). The court also expressed concern that acceptance of the inevitable victory approach would " 'spawn a second litigation of significant dimension,' [thereby] needlessly squandering scarce judicial resources." *Id.* at 403. The *Lopez* court, in remanding that case for a further hearing to determine whether an EAJA fee claimant would have prevailed absent the enactment of the Reform Act, expressed discomfort with the "awkward position" of requiring the district court to make such a hypothetical determination (882 F.2d at 1537). Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 561 (1988) (noting the undesirability of the "investment of appellate energy [in EAJA fee appeals that do not] produce the normal law-clarifying benefits that come from an appellate decision on a question of law"); *Texas State*

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reveals no challenge to either the Secretary's standards for finding medical improvement or the Secretary's mental health regulations. [Petitioner] requested remand of her case * * * not for review under new standards [,but for] * * * consideration of new and material evidence.").

Teachers Ass'n v. *Garland Independent School District*, 489 U.S. 782, 791 (1989) (warning against interpretation of fee statute that would "spawn a second litigation of significant dimension"); *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

2. Although we do not dispute petitioner's assertion that the circuits have reached differing results in considering EAJA fees in cases remanded under the Reform Act, this disparity does not warrant resolution by this Court. The question presented is relevant only to EAJA claims based on lawsuits pending as of September 19, 1984, and is thus of little continuing legal significance.

The decisions of the courts of appeals on the EAJA issue in this case affect only those benefit recipients who had been disqualified from receiving Social Security disability benefits prior to September 19, 1984, who appealed those decisions with the assistance of counsel, who had their benefits restored administratively after that date without additional litigation, and who have attorney fee petitions pending. While there may still be some such individuals, their numbers are steadily declining.[4] In such circumstances, further review to resolve any differences among the circuits as to the legal standards governing this ever-dwindling number of cases is not warranted. This Court recently denied review in a case raising this issue (*Kinney* v. *Sullivan*, 111 S. Ct. 538 (1990)). There is no reason for a different result here.

Petitioner tries to create continuing importance for her petition by asserting (Pet. 8) that the Court

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[4] Petitioner herself acknowledges (Pet. 8) that most cases remanded under the Reform Act have now been fully litigated.

should address the broader question of "whether a plaintiff whose victory coincides with a favorable change in the law can ever be considered a 'prevailing party' under [EAJA] or any other fee-shifting statute." But this case, and the other court of appeals decisions in issue, have examined EAJA's treatment of victories attained through legislative change in the law, and not those attained through judicial changes. Petitioner does not contend that Congress has ordered similar remands under other statutes. Instead, she relies on *Sullivan* v. *Zebley*, 493 U.S. 521 (1990), to argue that the question presented here is likely to recur. Pet. 9. In *Zebley*, this Court invalidated certain child-disability regulations promulgated by the Secretary of Health and Human Services. In response, the Secretary reassessed a class of child disability cases under newly promulgated regulations. The relation between the highly unusual legislative remand requirements contained in the Reform Act and the EAJA prevailing party requirement has little or no bearing on the relation between this Court's decision in *Zebley* (and/or the Secretary's reaction to it) and any claims for attorney fees—under EAJA or any other fee statute—that might be filed by claimants who recover benefits under the newly promulgated child disability regulations. At its broadest, the question in this case involves the relation between a legislatively required remand and the "prevailing party" requirement,[5] because different considerations govern the search for the necessary causal connection between a particular civil ac-

[5] That broad formulation, of course, overlooks the relevance of the language of the specific remanding Act at issue and its legislative history. See *Hendricks*, 847 F.2d at 1259 (considering legislative history of Reform Act).

tion and judicially or administratively instituted changes. See Pet. App. 3a. Legislatively required remands are at best highly unusual; moreover, in light of the fee litigation generated by the Reform Act, it is likely that any future such legislation will contain a specific provision regarding fee availability.

In short, petitioner's assertion that this case presents an issue that is likely to recur in other contexts is highly speculative. Any EAJA issues raised as a result of the Secretary's remand directive under the post-*Zebley* regulations, or other future changes in the rules governing benefit eligibility, should be addressed in the contexts in which they arise, not speculatively in this case, which arises in the context of a change with little continuing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

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JOAN PETRONE,
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v.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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January 15, 1992

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

Respondent Secretary of Health and Human Services (the "Secretary") has opposed review on the grounds that the decision below is correct and that, even if it is not, the issue here is not significant enough to warrant this Court's attention. As we now show, the Secretary misatates the facts and understates the importance of this case.

ARGUMENT

1. The Secretary does not dispute that there is a split of authority on the precise issue presented by this case, although he attempts to downplay it. *See* Opp. 4 ("Although there appears to be some disagreement among the circuits ..."). In fact, the circuit courts are deeply divided on the issue of whether Social Security claimants, whose cases were remanded to the agency under the

Social Security Disability Reform Act, are eligible for attorney's fees under the Equal Access to Justice Act ("EAJA") -- with three circuits going one way, three the other, and one circuit itself divided (Pet. 6-8 & n.*). Even the three circuit court decisions that have adopted a rule denying fees to Reform Act plaintiffs in all circumstances have prompted spirited challenges to that absolute denial approach. *See Petrone v. Sullivan*, 936 F.2d 428, 430-32 (9th Cir. 1991)(O'Scannlain, J. dissenting); *Guglietti v. Sec'y of HHS*, 900 F.2d 397, 405-08 (1st Cir. 1990)(Breyer, J., dissenting); *Hendricks v. Bowen*, 847 F.2d 1255, 1259-61 (7th Cir. 1988)(Easterbrook, J., concurring); *see also Truax v. Bowen*, 842 F.2d 995, 997-99 (8th Cir. 1988)(Heaney, J., dissenting). In short, both the depth of division and the seriousness of the discussion in the appellate courts belie the Secretary's suggestion that this case lacks significance.

2. The Secretary acknowledges that there "may still be some ... individuals" whose entitlement to EAJA fees will be affected if this Court grants review (Opp. 8), but then fails to recognize that the affected class is actually quite numerous. Indeed, the Secretary's own statistics, on the present status of Reform Act remands, while far from clear, indicate that there are 162 claims which have not, to this date, undergone even an initial post-remand *administrative* review, signifying that the number of cases that remain at the judicial review stage, either on the merits or on fees, is far greater still.[1] For example, two reported cases, involving the Secretary's pre-Reform Act termination of disability benefits, and subsequent application of the Reform Act standards, have only very recently been completed *on the merits*. *Nelson v. Sullivan*, 946 F.2d 1314 (8th Cir. 1991)(termination in 1983);

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[1] This figure -- 162 claims still awaiting post-remand review by the Secretary -- is contained in the Secretary's November 21, 1991 response to a September 17, 1991 request under the Freedom of Information Act, 5 U.S.C. § 552, which undersigned counsel provided to counsel for respondent on December 12, 1991. Thereafter, on January 9, 1992, undersigned counsel received an unsolicited telephone call from a Mr. Larry Miller, attorney for the Social Security Administration in Baltimore, Maryland, who stated that the agency's statistics were *underinclusive* because of the Secretary's failure to include all cases remanded under the Reform Act in the statistical database when it was originally created.

Griego v. Sullivan, 940 F.2d 942 (5th Cir. 1991)(termination in 1982). Although the plaintiffs did not gain reinstatement in those cases, for present purposes the import of those decisions is that, logically, if Reform Act cases remain alive on the merits (and they do), even more must exist at the fees stage. That being the case, this Court should grant review to resolve the profound division among the courts of appeals.[2]

3. The Secretary also argues that this Court's denial of certiorari in a similar case, *Kinney, et al. v. Sullivan*, 111 S. Ct. 538 (1990), should foreclose review here. However, in *Kinney*, the Secretary argued that there was no true conflict among the circuit courts, Br. for Resp. in Opp. at 4-8 (filed Nov. 5, 1990), *Kinney v. Sec'y of HHS*, 111 S. Ct. 538 (No. 90-5628), a position that the Secretary has abandoned here (Opp. 4, 8). Moreover, *Kinney* involved two unpublished *per curiam* decisions of the First Circuit, denying fees based on its recent decision in *Guglietti*, where, as the Secretary stressed, the district court had already found that the Secretary's position on the merits was substantially justified. *See Kinney v. Sec'y of HHS*, No. 90-1080, slip op. at 3 (1st Cir. June 7, 1990). Given the unlikelihood that the substantial justification rulings would be overturned, *see Pierce v. Underwood*, 487 U.S. 552, 558-63 (1988), there was considerably less reason to grant review there than here, where it appears that the Secretary's position on the merits was unreasonable (Pet. 3, 12-13) and neither the district court nor the court of appeals ever reached the substantial justification issue (Pet. App. 18a-19a; 6a-7a).

---

[2] Because most cases remanded under the Reform Act, both on the merits and with respect to fees, are not published, petitioner is not in the position to report on the precise number of pending fees applications. We are aware, however, of two recently filed applications, where the plaintiff won reinstatement of benefits after a Reform Act remand, thus presenting the same question as this case. *See Mendez v. Sullivan*, No. 83-4871 (E.D. Pa.)(fee application filed Jan. 8, 1992)(noting that Third Circuit has not ruled on "prevailing party" issue); *Bray v. Sullivan*, No. S-91-0116 WBS/PAN (E.D. Cal.)(fee application filed May 8, 1991)(originally No. C-83-3978 JPV). We also note that the Secretary, who *is* in the position to know how many Reform Act cases are pending, has not even attempted to address this question with any specificity.

4. Furthermore, as we have indicated (Pet. 9-10), the question presented here concerns not only the thousands of disability recipients who Congress sought to protect when it enacted the Reform Act, but also more generally whether, and in what circumstances, attorney's fees can be denied to a victorious plaintiff on the ground that a change in the applicable law arguably led to the victory. Although the Secretary decries this formulation (Opp. 8-9), that is precisely how the court of appeals understood this case (Pet. App. 2a)("The question presented by Petrone's appeal is whether a plaintiff whose victory results from a change in the law is a prevailing party within the meaning of the EAJA"). As we maintain (Pet. 12-13), and the Secretary had all but conceded below (*id.* at 13), petitioner would have won her case absent the Reform Act. Indeed, her victory had nothing whatsoever to do with the new Reform Act standards, which were never even applied on remand (*id.* at 3, 12), despite the Secretary's two unsupported statements to the contrary (Opp. 2, 3). The point here, however, is that the Ninth Circuit framed the general issue correctly, although its analysis and result were flawed.

In the petition, we illustrated this point by discussing this Court's recent decision in *Zebley v. Sullivan*, 110 S. Ct. 885 (1990), where automatic court remands and ensuing fees controversies identical to the one here will result from the Secretary's regulations promulgated to implement that decision (Pet. 9). The Secretary responds with the truism that the Reform Act was Congressionally-mandated, while *Zebley* remands flowed from a court decision (Opp. 9-10), but does explain at all why that distinction should make any difference on the EAJA fees question. Indeed, as the Ninth Circuit recognized (Pet. App. 2a), this case has nothing to do with the fact that petitioner's case was remanded, or that the remand was Congressionally-required, but rather concerns the broader question of what effect a change in the law during the pendency of a case should have on the availability of fees to the victorious party. In other words, it is only the fact that the Reform Act changed the standard for disability termination, and not that pending cases were remanded to the Secretary, rather than remaining in the district court, that has caused the differing theories and outcomes among the circuits on the fees issue. *See Hendricks*, 847 F.2d at 1260 (Easterbrook, J.,

concurring).

5. As we have shown, there are many individuals whose cases were remanded under the Reform Act, and whose rights to EAJA fees will be affected if this Court grants review. Not the least of these individuals is petitioner against whom a law, intended to help disabled people regain benefits that were wrongfully terminated, was used to deny her attorney's fees which otherwise should have been forthcoming (Pet. 12-13). In the final analysis, we view the impact of this case very differently than does the Secretary. Several years from now, Reform Act cases may be, in the Secretary's words, "approaching extinction" (Opp. 4). But *before* extinction occurs this Court should decide, for petitioner and many others, whether disability claimants may obtain a fee under the EAJA for the cost of defending against unreasonable governmental action. It is simply unacceptable to do as the Secretary urges, and allow the issue presented here to remain in utter confusion, while individuals such as petitioner, because of the happenstance of their geographical location, lose attorney's fees that may rightly be theirs.

CONCLUSION

For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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